85-691

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CECIL LEON RAMSEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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ATTORNEYS FOR PETITIONER

Petitioner, Cecil Leon Ramsey, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on September 16, 1985.

QUESTIONS PRESENTED FOR REVIEW

1. The decision of the Tenth Circuit of Appeals is in conflict with the decisions of other circuit courts of appeals on the interpretation of 18 U. S. C. §. 844(i) and 844(j) in construing gasoline as an "explosive" under the 1970 act used in Ramsey's charge.

2. Should petitioner have been granted a new trial based upon newly discovered evidence and recanted testimony?

3. Was petitioner denied his right to an impartial trial by error committed involving allegations of a "tainted" juror?

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All parties appear in the caption of the case.

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United States v. Reed, 726 F. 2d (9th Cir. 1984)

United States v. Sutton, 605 F. 2d 260, 269-270 (6th Cir. 1979)

JURISDICTIONAL STATEMENT

Judgment was entered 16 September 1985 by the Circuit Court of Appeals for the 10th Circuit denying petitioner's petition for rehearing with suggestion for hearing in banc and motions for stay of further proceedings and remand and continuance of bail, Appendix A attached. This petition for certiorari is timely filed within 60 days after entry of judgment in the Court below pursuant to Rule 20.1 of the Rules of the Supreme Court. This Court's jurisdiction is invoked under 28 U. S. C. §1254. Rehearing denied 16 Sept. 1985 (Appendix B)

STATUTES INVOLVED

18 U. S. C. §§. 2 - PRINCIPALS

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

18 U. S. C. §§. 371 - CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U. S. C. §§. 844(i)

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of * an explosive, any building, vehicle,

or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of the title.

* In 1982, in P. L. 97-298 (Anti-Arson Act of 1982), Congress acted to clarify confusion over 844(i) by adding "fire or" and making it read "means of fire or an explosive"

18 U. S. C. § 844(j)

For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section, the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 323 of this title, and any chemical compounds, mechanical misture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities or packing that ignition by fire, by concussion, by percussion, or by detonation of the compound mixture, or device or any part thereof may cause an explosion.

Added Pub. L. 91-452, Title XI, s. 1102(a), Oct. 15, 1970, 84 Stat. 956.

STATEMENT OF THE CASE

Judgment below was entered by a jury verdict of guilty on both counts of a two-count indictment charging the defendant, Cecil Leon Ramsey, (hereinafter referred to as "Ramsey"), with violations of 18 U.S.C. § 371 Conspiracy, 18 U.S.C. § 2 Principal and 18 U.S.C. § 844(i), Damaging Property by means of an explosive. Thereafter, Ramsey was sentenced to five years on each count, to run consecutively.

At trial, the United States of America, plaintiff (hereinafter referred to as "Government"), offered evidence to show Ramsey had employed Floyd Eugene Jackson, (hereinafter referred to as "Jackson"), to burn down a country store. The Government's evidence was that Jackson, along with two confederates, Tommy Joe Rockwell and Randall Morgan Johnson, (hereinafter referred to as "Rockwell" and "Johnson"), entered the store in the summer of 1981; poured gasoline

around the interior; that the gasoline ignited prematurely while the three were still in the store; thereby resulting in injury to Jackson and Johnson and death to Rockwell.

The Government contended that there was an explosion due to the use of gasoline and the use of gasoline constituted an explosive under 18 U.S.C. § 844(i). The Government further contended the country store was used in an activity affecting interstate commerce.

Ramsey testified in his own behalf and denied any arrangment with Jackson or the others involved in this crime. He also offered evidence to show that gasoline, as used in the case at hand, did not constitute an explosive as defined in 18 U.S.C. § 844(j) and that the facts established no conduct proscribed by Congress in 18 U.S.C. § 844(i).

During the course of the trial, Ramsey brought to the trial court's attention that

one of the jurors that was selected and sworn, Darlene Factor, was subject to bias and prejudice against Ramsey by virtue of being related to a law enforcement officer in Ramsey's home county. Mrs. Factor failed to reveal this essential fact during voir dire or answered untruthfully the questions propounded to her. Upon discovery of these facts, Ramsey argued to the trial court that the tainted juror be excused and the alternate be seated, but the trial court refused to take any action for three days, then on the fifth day of trial, offered to voir dire, in chambers, the juror in question. Ramsey's counsel, reasoning that the damage had already been done, declined this last day offer made by the Court.

After the verdict, but prior to sentencing, Ramsey asked for a new trial on the grounds that one of the witnesses against him, Jackson, had perjured himself. An affidavit of a disinterested third party

was offered to show that Jackson had stated that Ramsey was innocent of any criminal act. The trial court, without any hearing, denied Ramsey's motion for the new trial.

Ramsey further requested court permission to interview jurors after trial to ascertain the degree to which he had been prejudiced by the bias of the juror, Darlene Factor. The trial court, without any hearing, denied the motion as well as the motion for acquittal not withstanding the verdict.

Ramsey further moved for an arrest of judgment on the ground the court was without jurisdiction of the offense due to gasoline not being an explosive under 18 U.S.C. § 844(i) as defined in 18 U.S.C. § 844(j). The trial court denied the motion without a hearing and ruled that gasoline was an explosive, relying on United States v. Poulous, 667 F.2d 939 (C.A. Kansas 1982).

On 18 June 1982, Ramsey moved for a

new trial based on the newly discovered evidence of an affidavit from Jackson in which he recanted his trial testimony and completely exonerated Ramsey. The trial court, without any hearing, on 21 June 1982, denied the motion by a minute order without any findings of fact or conclusions of law or even before the Government filed a response to the motion.

These arguments were raised on appeal to the Tenth Circuit Court of Appeals, which granted partial relief by remanding the case back to the Eastern District of Oklahoma for an evidentiary hearing on the issue of Jackson's recantation. Upon remand and hearing, the trial Court overruled the motion for a new trial based on Jackson's recantation. That decision was then appealed and the Tenth Circuit ruled in United States v. Ramsey, 726 F.2d 601, (C.A. Oklahoma 1984), that the recanted testimony did not meet the test for newly

discovered evidence; that gasoline spread around a building was an explosive under 18 U.S.C. § 844(i)(j); and that the trial court had not erred on the issue of the tainted juror.

Since the Tenth Circuit ruled, further recantations involving not only Jackson but Johnson as well, have arisen and have all been placed before the trial court in motions for new trial based upon newly discovered evidence, Appendix A. All motions, except one now pending, were initially denied without hearing, Appendix B. The Tenth Circuit has denied further relief as well in its decision of 7 May 1985, Appendix C, and 16 September 1985, Appendix D; Ramsey's motion to withdraw the court's mandate and grant bail pending certiorari has been filed and is currently pending, Appendix E.

REASONS FOR GRANTING THE WRIT

Proposition No. 1: The decision of the Tenth Circuit Court of Appeals is in conflict with decision of other circuits on the interpretation of 18 U.S.C. § 844(i) as 844(j) defines explosives, with reference to gasoline being considered an "explosive" under the act.

18 U.S.C. § 844(i) provided the jurisdictional basis for the conviction of Ramsey and 844(i) was necessarily construed in the light of 844(j), definition of an explosive. The jurisdiction focuses on whether or not gasoline should have been considered as an explosive. Although the Tenth Circuit has previously held gasoline is an explosive, U.S. vs. Poulous, supra, this interpretation is in clear and substantial conflict with the decisions of the Ninth Circuit in United States v. Gere, 662 F.2d

1291 (1981), United States v. DeLuca, 692 F.2d 1277 (1982), and United States v. Reed, 726 F.2d (1984). The Second Circuit has also diverged from the expansive interpretations by the Tenth Circuit, holding that gasoline was not an explosive under 18 U.S.C. § 844(i), in United States v. Gelb, 700 F.2d 875 (1983) and in United States v. Katsougrakis, 715 F.2d 769 (1983).

Congress amended 18 U.S.C. § 844(i) in 1982 to include damage or destruction "by means of fire or an explosive" (emphasis added), clearly stating an intent to cover arson in the amended statute. House committee reports indicate that the difference in circuit opinions was the stimulus for the clarifying amendment, H.Rep. No. 97-678, 97th Cong. 2d Session, 2n.6 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 2631, 2632, n.6.

Furthermore, it was quite clear in earlier statutes that in no way did Congress

intend to interfere with the arson investigations and the common-law responsibilities of the state but rather at the time of the original enactment, wanted to control the bombings of public buildings and other types of underground activity that were prevalent in the late 1960's and early 1970's.

The fact that Congress saw the necessity to clarify the act supports the proposition the act was ambiguous. The law at the time of Ramsey's conviction was being interpreted in a completely different manner by at least three circuits. Ramsey's indictment would have been dismissed, had he been charged in the State of New York or California, for example, with exactly the same offense.

There can be no question that the personal liberty of Ramsey is threatened by the Court's interpretation of gasoline as an explosive by the Tenth Circuit and is

being threatened in the instant case, with the Tenth Circuit view directly contradicted by other Circuits.

The conflict in opinions between the circuits has continued even after the 1982 amendments. The Ninth Circuit in U.S. v. Reed, supra, found in 1984 that a conviction based upon a 1979 violation of 18 U.S.C. § 844(j) had to be overturned saying in part, on page 573,

> "Even before the amendment other federal circuits had given a broader interpretation of the statute in finding the existence of an explosive. See e.g., United States v. Agrillo-Ladlad, 675 F.2d 905 (7th Cir.), cert. denied 459 U.S. 829, 103 S. Ct. 66, 74 L.Ed. 2d 67 (1982) (naptha-soaked newspapers spread across the floor and ignited by a burning piece of paper); United States v. Hepp, 656 F.2d 350 (8th

Cir. 1981) (delayed ignition device consisting of a cigarette inserted in a matchbox and suspended by a thread into a gasoline laden atmosphere). Nevertheless, Gere was controlling law in this circuit when the appellants were convicted and when they appealed, and we are bound to follow its narrower interpretation of the statute. United States v. DeLuca, 692 F.2d 1277, 1280, (9th Cir. 1982)."

Ambiguities, when they exist, should be resolved in favor of a criminal defendant, Rewis v. United States, 401 U.S. 808, 812, 91 S. Ct. 1056, 28 L.Ed. 2d 493 (1971); United States v. Sutton, 605 F.2d 260, 269-270 (6th Cir. 1979); United States v. Birchfield, 486 F.Supp. 187 (M.D. Tennesee 1980).

When the language of a statute is unambiguous, judicial inquiry ordinarily is

at an end. A difference between the Second and Third Circuits regarding interpretation of a section in the Consumer Product Safety Act led to Supreme Court review, however in Consumer Product Safety Commission v. GTE, Sylvania, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L.Ed. 2d 766 (1980). Despite the seeming clarity of § 844(j) in its original form, the Legislative history of the Organized Crime Control Act should be examined to determine whether an extension of Federal involvement into arson was warranted, prior to the 1982 amendment. See United States v. Enmons, 410 U.S. 396, 411 (1973). Congress has repeatedly expressed concern with respect to interfering in areas that are presently covered by State law. It was the intent of the Federal Government not to substitute Federal law enforcement activities for that of State and local officials. It is clear from the legislative history that the legislative

intent of the original law was not to include arson in the act and that the use of gasoline to produce a fire in the country store in this case, was not a criminal act intended to be targeted by the original measure. From reading the act, and its legislative history, it seems clear that that gasoline, when used to ignite a fire, certainly does not fall within the "explosive" meaning as the originators of the act intended.

To resolve this continuing difference of opinions between circuits and to protect the personal liberty of any person, including Ramsey, from receiving unequal treatment under the law of our land, a Writ of Certiorari should be issued.

Proposition No. 2: Should petitioner have been granted a new trial based upon newly discovered evidence and recanted testimony?

The record in this case is marked by the number of different stories and recantations by the Government's chief witnesses against Ramsey. The trial record is clear that it was the testimony of co-conspirators, Jackson and Johnson, that convicted Ramsey and that the Government entered no independent evidence to corroborate that testimony.

Jackson has testified, recanted, recanted the recantation, and finally returned to the recantation which absolves Ramsey of any involvement. See Appendix F. The trial court has overruled motions for new trial and the Tenth Circuit has refused to overrule the trial court's decision denying a new trial after its one evidentiary hearing. Johnson has also testified and has now recanted his original testimony by means of a statement given on the 9th day of October, 1985, said statement being attached hereto as part of a motion for new trial that is currently pending with

the trial court. This recantation completely absolves Ramsey of any involvement in the activity and without the testimony of Jackson and Johnson, the Government has no independent evidence for a conviction.

The Tenth Circuit said in its opinion of 7 May 1985, "While such a precarious and vacillating witness, (referring to Jackson), is an unstable stand on which to base a conviction, we cannot say that the record justifies overturning the trial court's decision on a petition for a new trial." See Appendix C.

While at the time the court wrote that opinion, the evidence may not have seemed sufficient to grant the new trial, the subsequent filings showing that Johnson now joins Jackson in admitting Ramsey's innocence, have cumulative weight that points to the probability of an acquittal if the case were retried. Evans v. United States, 122 F.2d 461, 468-469 (10th

Cir. 1941); Ramsey v. United States, 726 F.2d 601. In addition, new questions concerning potential misconduct of the Government prosecutor have arisen. See Appendix F. These developments would further bring the instant case within the guidelines of U.S. v. Ramsey, supra.

Proposition No. 3: Was petitioner denied his right to an impartial jury by error committed involving allegations of a "tainted" juror?

Voir dire is intended to guarantee the right to an impartial jury by allowing the defendant to expose prospective jurors' actual bias and prejudice. Dennis v. United States, 339 U.S. 162, 171-172, 94 L.Ed. 734 (1950).

In the case at bar, a serious breach of impartiality was called to the trial court's attention when it was learned by

defense counsel that a seated, and sworn juror, Darlene Factor, was related to a law enforcement officer in the county where both she and Ramsey lived. This fact was confirmed by the Government prosecutor and reported to the Court. The trial transcript shows that Mrs. Factor was silent on voir dire when asked if any of her immediate family was involved in law enforcement. See Appendix G.

Counsel for Ramsey declined the court's offer to voir dire Mrs. Factor further after the trial was into its final day, for the reason that it was believed that a voir dire of her at that stage would come too late and not cure any taint of the jury caused by her presence, through five days of trial.

Ramsey asserts that the failure to allow post-trial interviews with jurors further prejudiced him. Mattox vs. United States, 146 U.S. 140, 36 L.Ed. 917 (1982).

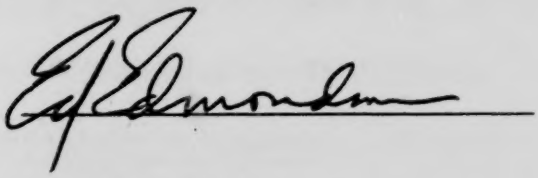
Although the results of post-trial interviews would be a matter of conjecture, the denial of the right under the facts in this case could constitute grounds for issuance of a Writ of Certiorari.

When the possibility of jury misconduct is raised, a presumption of prejudice arises and can only be properly rebutted or confirmed by adequate inquiry by the trial court. Remmer v. United States, 347 U.S. 227, 229-230, 98 L.Ed. 654 (1954); Richardson v. United States, 360 F.2d 366, (5th Cir. 1966).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 81-72-CR
CECIL LEON RAMSEY, Defendant.	)	

MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

Defendant moves pursuant to Rule 33, Federal Rules of Criminal Procedure, for a new trial based on the ground of newly discovered evidence, and in behalf thereof states as follows:

1. The facts and circumstances upon which this motion is made appear in the affidavits of Floyd Eugene ("Tuffy") Jackson and Elaine Joyce Fuller annexed.

2. An appeal from conviction in this case is pending before the United States Court of Appeals for the Tenth Circuit, and a motion has been made to that Court to stay further proceedings and remand the

case to the District Court so that the Judge before whom the case was originally tried may, in his discretion, grant this Motion for New Trial in accordance with Rule 33. A copy of the motion for stay and remand is annexed.

3. Briefly stated, the newly discovered evidence is a complete exoneration of the Defendant by the Government's key witness, Tuffy Jackson. It is also Jackson's confession to perjury at the Defendant's trial, and as a knowledgeable admission against interest has special aspects of trustworthiness. It is corroborated by the accompanying affidavit from Fuller, Jackson's common-law wife, by the affidavit of Howard Hutchison on January 7, 1982, attached to Defendant's earlier Motion for New Trial, and by hearsay declarations of Jackson offered by the Defendant for impeachment purposes at trial. All are consistent, but

this newly discovered evidence is the first to be obtained directly from Jackson, first-hand, under oath, admitting perjury, explaining the motive for the crime and how it was actually committed, explaining the innocence of the circumstantial events used by the Government to accuse Ramsey, explaining the reasons for his recantation, assuring against undue influence, explaining how co-conspirator and Government witness Randall ("Chubby") Johnson perjured himself, and explaining how Jackson was frightened into giving perjurious testimony by the advice from his court-appointed lawyer that Jackson could be given the death penalty unless he went along with the Government's requirements.

4. The evidence is newly discovered, i.e., discovered since the trial, and was obtained within the time limits of Rule 33.

5. By its nature it could not have been discovered earlier; it depended on Jackson's decision alone to come forward and admit his crime at trial. On June 12, 1982, Fuller revealed that Jackson was ready to make a statement exonerating the Defendant; efforts began that day to obtain permission to visit Jackson at the Federal prison camp in El Reno and to verify Fuller's statement; on June 16, 1982, the first opportunity to visit him, Jackson executed his affidavit.

6. The evidence is not merely cumulative or impeaching, though it does impeach Chubby Johnson's testimony. Prior inconsistent statements attributed to Jackson were all hearsay from third parties - members of the Defendant's family, an investigator hired by the Defendant, a relative of Jackson's common-law wife - all unsworn, all explained by Jackson to the jury as lies just to get people off his back. As a sworn statement

directly from Jackson, admitting perjury, initiated by him on his request, totally exonerating Ramsey, disavowing any undue influence, it is far more than merely cumulative or impeaching - it is a complete recantation of the evidence by which Ramsey was convicted. As such it is also patently material to the issues of the case - the participation, knowledge, malicious intent and assistance of which Ramsey was accused at trial.

7. Defendant does not believe or assert that the Government acted in anyway but in good faith reliance upon Jackson's earlier assurances that his statements inconsistent with statements to law enforcement officers were untrue and to get the Defendant's family and investigator, former F.B.I. agent Bennie Garren, off his back. Therefore, Defendant accepts the rigorous burden of showing that, on a new trial, the newly discovered

evidence would probably produce an acquittal. In so doing, Defendant asserts that it is certain to produce an acquittal assuming the Government would choose not to dismiss on its own motion.

8. Finally, Defendant asserts that he has been wrongly and unjustly convicted by perjured testimony, and further asserts that there is an even more serious question: whether a co-conspirator can flout the law and lie about material and essential matters, procure the conviction of an innocent person, and then get off with a minor term of imprisonment and complete immunity for his perjury. It is within the discretionary power of this honorable Court not only to correct the manifest injustice to this Defendant by granting him a new trial wherein the truth can finally be told, but also to correct the injustice done by perjury to the Court itself, to the Government and to our

native system of law.

ATTACHMENTS: JACKSON AND FULLER AFFIDAVITS
MOTION FOR STAY AND REMAND

RESPECTFULLY SUBMITTED,

/s/James E. Edmondson

JAMES E. EDMONDSON
P.O. BOX 11
MUSKOGEE, OK 74401
(918) 682-6230

Attorney for Defendant

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Motion for New Trial based on newly discovered evidence was hand-delivered on this 18th day of June, 1982, to:

United States Attorney's Office
United States Courthouse
Muskogee, OK 74401

/s/James E. Edmondson
JAMES E. EDMONDSON

STATE OF OKLAHOMA)
) ss.
COUNTY OF CANADIAN)

AFFIDAVIT

I, FLOYD EUGENE JACKSON, being duly sworn, make the following statement at El Reno Camp to James E. Edmondson:

I was a witness against Cecil Ramsey in Federal Court, and testified that he paid me to burn down Stone's Corner Grocery. I did not testify truthfully at that trial. Cecil did not have anything to do with that fire.

I met with Cecil the day before the fire to ask where his son, Leon, was. I asked him to loan me some money, but he refused. I gave Cecil a ride to Stone's Corner Grocery, where he pointed in the direction where Leon worked around Redbird. No money changed hands, and we did not discuss any arson or burglary or any other crime. He told me to stay away from his son.

I testified against Cecil Ramsey the way I did because I was scared. My appointed lawyer told me I could be given the needle or a long time in the pen unless I went along with the federal lawyers and investigators.

The reason I blamed Cecil and the reason I did the burglary of Stone's Corner Grocery was that I had rebuilt a car engine for Cecil for $500.00. and he Paid me only $200.00. He kept putting me off on the other $300.00, so I decided to take it from his store. I didn't know then it was his girlfriend's store.

There wasn't any money in the store when we broke in, so Tommy Rockwell siad "let's just burn it down." I agreed and siphoned some gas out of Tommy's car, and we used it to burn the store down.

The reason I am making this statement now is that ever since I was badly burned in that fire and spent about a

month in the hospital, I've had nightmares about what I did and my conscience has been bothering me. I realize my testimony broke the law and I know what perjury is. I have not been paid or promised anything by Cecil Ramsey or anyone else to make this statement, and neither has my family.

Cecil Ramsey was innocent of anything to do with that fire. Everything Chubby (Randall Johnson) said against Cecil, I told him to say and was false.

FURTHER AFFIANT SAYETH NOT.

/s/ Floyd Jackson
FLOYD EUGENE JACKSON

Subscribed and sworn to before me on this 16th day of June, 1982.

/s/ Lisa Wilson
Notary Public

My Commission Expires:
6/18/84

STATE OF OKLAHOMA)
) ss.
COUNTY OF MUSKOGEE)

AFFIDAVIT

I, ELAINE JOYCE FULLER, being of legal age and duly sworn, make the following statement:

I am the common law wife of Floyd Eugene Jackson, known as Tuffy. Tuffy testified against Cecil Ramsey in federal court and said that Cecil put him up to burning Stone's Corner Grocery in Wagoner County. In May of 1982 I visited Tuffy at the El Reno Camp where he is serving his sentence for that crime, and Tuffy told me that he wanted to talk to Leon, Cecil's son, because he wanted to tell the truth, that Cecil did not have anything to do with the fire.

Later I saw Tuffy again and he told me to make a statement about this and that he wanted to make a statement about it, too.

/s/ Elaine Joyce Fuller
ELAINE JOYCE FULLER

Subscribed and sworn to before me on this 12th day of June, 1982.

/s/ Lisa Wilson
Notary Public

My Commission Expires:
6/18/84

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff	)	No. 81-72-CR (No. 84-1544)
v.	)	(No. 82-1120) 10th Cir.
CECIL LEON RAMSEY,	)	
Defendant	)	

MOTION FOR NEW TRIAL BASED UPON NEWLY DISCOVERED EVIDENCE

Comes now the defendant, Cecil Leon Ramsey, and hereby states to the court as follows:

1. That this defendant, Cecil Ramsey, has previously been convicted in the Eastern District of Oklahoma and that said conviction was appealed to the United States Court of Appeals, Tenth Circuit, and that same has now been remanded back to the Eastern District of Oklahoma and the Mandate spread of record.

2. That the defendant presents this motion for new trial to this Honorable Court so that certain evidence of untruthful test-

imony may be brought to the attention of this Court. Furthermore, the defendant would state that this evidence could not have been discovered at the time of the trial and has only recently become available to this defendant.

3. Defendant would further state that this evidence is of the kind and nature that would likely result in a different outcome at the time of trial. Said new evidence consists of a statement that has been made by one of the Government's chief witnesses, Randall Morgan Johnson, whereby Johnson has voluntarily given a statement that has been transcribed by a certified Court Reporter and said statement would exonerate and completely absolve the defendant, Cecil Leon Ramsey, of any wrongdoing.

4. That furthermore, this statement only recently made by Johnson, that being made on 9 October 1985, tends to corroborate the recanted testimony of another chief

Government witness, Floyd Eugene Jackson. Jackson has previously made voluntary, unsworn statements, to one of defendant's counsel, Rob Pyron, that corroborates certain earlier statements that have been made.

5. This motion is offered solely to present to this Honorable Court substantial and material new evidence that would likely produce a different outcome at the time of a trial. It is not offered for any delaying tactics nor to delay the proper administration of the Courts of the United States of America.

6. That said statement is attached hereto, marked as Exhibit A as though fully set out herein.

WHEREFORE, premises considered, defendant prays that this Court grant a new trial based on the newly discovered evidence or in the alternative, to hold anevidentiary hearing to receive all evidence offered by this defendant and for any and all other relief that would be just and proper in the

premises.

S/ Ed Edmondson

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STATEMENT OF RANDALL MORGAN JOHNSON

on October 9th, 1985 at the law office of Mr. James E. Gotcher, 321 S. Third Street, McAlester, Pittsburg County, Oklahoma, before Kenneth E. Pierce, a Certified Shorthand Reporter duly certified under and by virtue of the laws of the State of Oklahoma.

APPEARANCES:

MR. JAMES E. GOTCHER, McAlester, Oklahoma.

Q. (By Mr. Gotcher) All right. Would you state your name, please, sir?

A. Randall Morgan Johnson.

Q. Mr. Johnson, we're here in my office in McAlester, Oklahoma, is that correct?

A. Yes.

Q. And do you understand that you have come to my office for the purposes of giving me a statement? Is that correct?

A. Yes.

Q. And are you doing this freely and voluntarily and at your own request?

A. Yes.

Q. Have you and I ever met?

A. No.

Q. Now, Mr. Johnson, I'm going to ask you a few questions relative to certain matters that you have most recently explained to me, and I want you to be sure that any question that I ask of you, that you understand it. Do you understand that?

A. Yes.

Q. And be sure that any question I ask of you, that you don't answer it unless you absolutely understand it at the time. Can we agree on that?

A. Yes.

Q. Now, Mr. Johnson, have you -- have you sought my legal advice concerning the statement that I'm getting ready to ask you about?

A. Yes.

Q. And are you willing to give a statement at this time about some past occurrences, but you do decline to make a sworn statement?

A. Yes.

Q. Have I advised you generally of the law of perjury?

A. Yes.

Q. And have I also told you that it is impossible for me, or any other lawyer, for that matter, to commit a prosecuting attorney's office or bind some prosecuting attorney to some commitment or some course of action?

A. Yes.

Q. Now, with those things in mind, Mr. Johnson, I will first ask you "where do you reside?"

A. Where do I stay at?

Q. Where do you live?

A. Randolph Drive, 48 Randolph Drive in Seminole.

Q. And do you live alone or do you live with someone?

A. I live with my wife.

Q. And do you and your wife have children?

A. One, a little boy.

Q. And is this your first marriage, Mr. Johnson?

A. Yes, it is.

Q. And did I ask you your age?

A. Yes, you did.

Q. You're twenty two years of age?

A. Yes.

Q. And what was the highest grade you completed in high school, Mr. Johnson?

A. To the tenth.

Q. Did you complete the tenth?

A. Yes, I did.

Q. Mr. Johnson, you have informed me that you were seventeen years of age at the same time when you should have been in the eleventh grade, is that correct?

A. Yes.

Q. I will ask you if you, unfortunately, got into some difficulty with the law back when you were seventeen years of age.

A. Yes.

Q. And in what state was that in?

A. It was in -- when I got in trouble,

that was in Muskogee with the Muskogee Court.

Q. Was it in Oklahoma? What state?

A. In Oklahoma.

Q. Oklahoma, and you say it was in Muskogee, would it have been in Federal Court?

A. Yes, it is.

Q. All right. Mr. Johnson, were you charged with some violation of the law in Federal Court?

A. Yes.

Q. Do you know what an indictment is? If I use that word, do you know what a Grand Jury indictment is, and if you do not know, say you do not know.

A. No.

Q. All right. Do you know what a piece of paper is that says that you've done something bad and they talk about Count 1, Count 2 and Count 3, this type of thing?

A. Oh, yeah.

Q. Is that familiar to you?

A. Uh-huh.

Q. All right. Do you remember some piece of paper that said that you did something bad back when you were seventten and it had Count 1, Count 2 and so on in it, sir?

A. Yes.

Q. Do you know how many counts you were charged with, if it was more than one?

A. At first, it was five, I think, I believe.

Q. Were you able to hire your own lawyer?

A. No.

Q. May I assume then that the Court appointed you one because you were without funds to have an attorney?

A. Yes.

Q. Are you--are you of the black descent?

A. Yes.

Q. Mr. Johnson, do you remember the lawyer's name that was appointed to represent you?

A. Brown.

Q. Do you remember his first name?

A. No, I don't.

Q. Was Mr. Brown of the black descent?

A. Yes.

Q. Did you have an occasion to have contact with a member of the prosecuting attorney's office?

A. Yes.

Q. Who was that?

A. Patrice Lattaman.

Q. Okay. So that the reporter can get that, the first name, is it--are you saying Patrice?

A. Yes.

Q. Do you have any idea how to spell it?

A. No, I sure don't.

A. All right. You ask then that the reporter simply spell it phonetically, is that correct?

A. Yes.

Q. What about the last name? Would you say it slowly, please?

A. Lattaman.

Q. Lattaman?

A. Yeah.

Q. It ends in (spelling) M-A-N?

A. M-A-N.

Q. Thank you, Mr. Johnson. This particular individual, was she an attorney for the U. S. Attorney's office?

A. Yes.

Q. Was she of black descent?

A. Yes.

Q. Now, through the course of the time that you were involved in Muskogee, who represented you as an attorney?

A. Patrice Lattaman.

Q. Now, do you understand that that lady was, by what you've told me, an Assistant U. S. Attorney, is that correct?

A. Yes.

Q. Did she -- however, in your words, did she advise you of what to do?

A. Yes.

Q. What did Mr. Brown do, so far as advising you?

A. Nothing.

Q. Did he withdraw or leave your case?

A. Yes, withdraw.

Q. Mr. Johnson, did you -- strike. Mr. Johnson, were you advised as to what your penalty could be if you did not cooperate with the prosecuting authority?

A. Yes.

Q. What was that?

A. I could get fifty years.

Q. Were you then advised what your penalty would be if you cooperated?

A. About five years.

Q. Thank you. Mr. Johnson, were you charged with other individuals?

A. Yes.

Q. What other individual or individuals were charged with you?

A. Arson.

Q. All right. That was the -- that was the name of the case. That was what the crime was, is that right?

A. Yes.

Q. All right. What other people or persons were charged with the same alleged violation of the law?

A. For breaking in --

Q. No, Mr. Johnson, I'm asking you to give me some people's names that were charged with you.

A. Okay. Floyd Jackson and JoJo Rockwell.

Q. Anybody else?

A. And Cecil Ramsey.

Q. I will ask you if you made an agreement with anyone to testify in the Court against Mr. Cecil Ramsey?

A. Yeah, agreement, yes.

Q. All right, and who did you make that agreement with?

A. Patrice, Patrice Lattaman.

Q. And did you enter a plea of guilty to any charge based upon that agreement that you had with Ms. Lataman?

A. Yes.

Q. Did you get any time?

A. Yes.

Q. How much time did you get?

A. Fourteen months.

Q. Is that the time that you got or is that the time you spent?

A. That is the time I spent.

Q. How much time did the Judge give you, if you'll remember?

A. Eighteen months.

Q. All right. Mr. Johnson, did you in fact testify in the courtroom against Mr. Ramsey?

A. Yes.

Q. Now, I don't know anything about the case, is that correct/

A. Yes.

Q. I will ask you, Mr. Johnson, if in the Court of law, back when you were seventeen, did you tell the Jury in the courtroom that Mr. Ramsey was involved in that particular violation of the law having to do with arson that you told me about?

A. Yes.

Q. Mr. Johnson, you have had approximately four to five years now after that testimony,

is that correct?

A. Yes.

Q. I'll ask you know, was Mr. Ramsey in fact involved in that arson?

A. No.

Q. You are now coming forward, some four to five years later, and you -- as I understand your testimony, you're changing or recanting that testimony, is that correct?

A. Yes.

Q. And Mr. Johnson, are you aware of the fact that it is possibly a lot simpler for you simply to be quiet? Do you understand that?

A. Yes.

Q. Can you explain to me, Mr. Johnson, why you're coming forward at that time to make a statement that Mr. Ramsey was not involved, as you said he was involved?

A. Would you repeat that again?

Q. Why are you now coming forward and saying that Mr. Ramsey was not involved?

A. Well, when I was in jail, falsely accused

of rape, which I know I didn't do, but when I was in there, I started thinking about Cecil's case when he was falsely accused, what he did, and I wanted it -- before I ever went to the Court, I wanted to change and I didn't want to say it under oath, but when they said that I could probably get fifty years and I would probably get five years if I, you know, cooperated with them and that's what made me did that.

Q. Okay, Mr. Johnson, you have indicated that when you were in jail for rape --

A. Uh-huh.

Q. -- as I understand, you are presently under a charge of rape, not yet convicted, in Seminole County, is that correct?

A. Yes.

Q. And you're referring to a time when you were in jail waiting to make bond, is that correct?

A. Yes.

Q. You're now out on bond?

A. Yes.

Q. Now, have I, as I have discussed with you, told you of the possibility of the difficulty that you might face by recanting your testimony? You understand that?

A. Yes.

Q. Even in the light of that, you wish to make this statement, is that correct?

A. Yes.

Q. You have, however, instructed me that at least for the moment, you wish only to sign the statement, but not to sign as a sworn statement, for fear of being charged with perjury, is that correct?

A. Yes.

Q. Let me ask you, for the moment, if this statement was a sworn statement, would it still be the same statement that you've given me?

A. Yes.

Q. To your knowledge, is anyone, including myself, Mr. Johnson, presently forcing you, in any way whatsoever, to make this statement, or have you been promised anything

whatsoever of any value to get you to make this statement, or is there any outside force that would keep this statement from being anything but your free and voluntary account?

A. Yes.

Q. Now, I want you to understand the question. May I repeat it, sir?

A. (nods head)

Q. Let me break it down. All right?

A. (nods head)

Q. Has anybody promised you anything to make this statement?

A. No.

Q. Has anybody threatened you to make this statement?

A. No.

Q. Has anybody intimidated you in any way to make this statement or change your story?

A. No.

Q. To your knowledge, is there anything whatsoever, any outside influence or outside force that causes you to make this statement, other than the fact that it's the truth?

A. Yeah, that's the truth on that.

Q. All right. So the statement that you've made is the truth, is that correct?

A. Yes.

MR. GOTCHER I believe that's all.

Thank you, Mr. Johnson.

MR. JOHNSON: Thank you.

_____

RANDALL MORGAN JOHNSON

****

CERTIFICATE

STATE OF OKLAHOMA)
) SS
COUNTY OF PITTSBURG)

I, Kenneth E. Pierce, a Certified Shorthand Reporter, duly certified under and by virtue of the laws of the State of Oklahoma, DO HEREBY CERTIFY that the proceedings had in the foregoing cause were taken by me in stenograph and later reduced to typewritten form under my supervision, and that the foregoing pages, numbered 1 to 13, inclusive, contain a full

true and correct transcript of all the evidence and testimony had during said proceedings; that I am not a relative of nor an attorney for any of the parties in this matter, nor do I have an interest in the event of same.

WITNESS MY HAND AND SEAL, in the City of McAlester, County of Pittsburg, and in the State of Oklahoma, on this, the 10th day of October, 1985.

/s/ Kenneth E. Pierce
KENNETH E. PIERCE, CSR

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 81-72-CR
CECIL LEON RAMSEY, Defendant.	)	

ORDER DENYING DEFENDANT"S MOTION FOR NEW TRIAL ON NEWLY DISCOVERED EVIDENCE AND TO REOPEN HEARING THEREON

On April 3, 1984, a hearing was held on defendant's motion for new trial pursuant to a Judgment of Remand by the United States Court of Appeals for the Tenth Circuit. U.S. vs. Ramsey, F.2d ____, (No. 82-1120, decided January 20, 1984).

The basis of defendant's motion is an affidavit of Floyd Jackson given to defendant's counsel, after defendant's conviction, which recants his trial testimony. (Defendant's Exhibit #2.) Floyd Jackson was a key prosecution witness against the defendant. Jackson's trial

testimony was that the defendant paid him to burn down a store which was the basis of the charges on which defendant was convicted. Jackson's affidavit states that he did not testify truthfully at the trial, that the defendant did not have anything to do with the fire, and that the defendant was innocent.

Elaine Fuller, Jackson's common-law wife at the time of the fire, testified that Jackson told her the defendant had nothing to do with the fire. Jackson testified that he did make such a statement to her, but it was not true.

Howard Lester Hutchinson, Elaine Fuller's brother, testified that Jackson told him that the defendant had nothing to do with the fire. Jackson testified that he did not make such a statement to Hutchinson. Hutchinson has done work for the defendant since 1978.

The defendant's son, Leon Ramsey, testified that he visited Floyd Jackson

at the federal correctional facility at El Reno, Oklahoma, on several occasions after the defendant's conviction. He testified that Jackson told him that his father, the defendant, was innocent and did not have anything to do with the fire. Jackson testified that he did make that statement to defendant's son, but that it was not true. Jackson and defendant's son had been friends and had run around together prior to defendant's trial.

Floyd Jackson testified that he did make and sign the affidavit admitted into evidence. However, he testified it was not true. He testified that his trial testimony was true and correct. He testified that he had made the false affidavit to defendant's counsel because he was scared of what the defendant might do. He further testified that defendant's counsel, Jim Edmondson, had no knowledge that the affidavit was false, and this ccurt so finds.

Jackson also testified that, prior to defendant's trial, he told Leon Ramsey, defendant's son, that the defendant did not have anything to do with the fire. Leon Ramsey so testified at this hearing. A review of the trial transcript shows Jackson was cross-examined on this issue at defendant's trial (T., Vol. V, pp. 302-309). Thus, Jackson's statement that the defendant did not have anything to do with the fire was known by the defendant at the time of trial. The court finds it is not newly discovered evidence.

Randell Johnson, a co-defendant, testified at the hearing and again corroborated Jackson's trial testimony of defendant paying Jackson to burn the store.

As the Circuit Court stated, recanted testimony is properly viewed with suspicion. U.S. v. Ramsey, supra p.8.

The court finds that Jackson's affidavit (Defendant's Exhibit #2) is

false with respect to differences between it and Jackson's trial testimony. The court finds no recantation of trial testimony by Floyd Jackson, and that the jury previously has heard these allegations and determined Jackson's credibility thereon. (U.S. v. Allen, 554 P.2d 398 (10th Cir. 1977), cert. denied 434 U.S. 836 (1977); U.S. v. Briola, 465 F.2d 1018, 1022 (10th Cir. 1972), cert. denied 409 U.S. 1108 (1973).

On April 5, 1984, defendant filed a motion to reopen the hearing on defendant's motion for new trial. The court has examined and considered the motion and the attached affidavits, and the court finds that the matters raised therein are cumulative and do not change the findings herein of this court. U.S. v. Allen, supra at p.403.

Accordingly, defendant's motions for new trial on newly discovered evidence and to reopen the hearing thereon are denied.

IT IS SO ORDERED this 6th day of April, 1984.

/s/ Frank H. Seay
Frank H. Seay
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	No. 81-72-CR
CECIL LEON RAMSEY, Defendant,	)	

NOTICE OF MINUTE ORDER

You are advised that the following Minute Order was entered in the above-styled and numbered cause on the date indicated:

6/21/82 . . .Entering order denying Motion of defendant, Cecil Leon Ramsey, for New Trial based on Newly Discovered Evidence. (FHS) (Copy to counsel)

Lewis L. Vaughn, Clerk
by /s/ Ardyce Briggs
Deputy Clerk

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	NO. 84-1544
	)	
CECIL LEON RAMSEY,	)	
	)	
Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA
(D.C. No. 81-72-CR)

Ed Edmondson (Thomas H. Alford with him on the briefs) of Edmondson, Alford & Edmondson, Muskogee, Oklahoma, for Defendant-Appellant.

Donn F. Baker, Assistant U.S. Attorney (Gary L. Richardson, United States Attorney, with him on the brief), Eastern District of Oklahoma, Muskogee, Oklahoma, for Plaintiff-Appellee.

Before HOLLOWAY and McKAY, Circuit Judges, and KANE, District Judge.*

McKAY, Circuit Judge.

---

*Honorable John L. Kane, Jr., United States District Judge for the District of Colorado, sitting by designation.

5-7-85

84-1544

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SLIP OPINION

We are called upon in this case to decide the proper weight to be given to a recanted recantation. The defendant was tried and convicted of hiring one Jackson to burn down a store. The linchpin of the government's case against the defendant was Jackson's trial testimony that the defendant paid him to burn the store down. Prior to the trial, Mr. Jackson had told the defendant's son that the defendant did not have anything to do with the fire. At trial Mr. Jackson was cross-examined on this issue by defendant's counsel and testified that his statement to defendant's son had been false. The jury returned a verdict convicting the defendant. After the trial Mr. Jackson told his common-law wife and her brother, who worked for the defendant, that the defendant was innocent. In addition, Mr. Jackson signed an affidavit stating that the defendant

was innocent and that his trial testimony was false.

Pursuant to this court's mandate in United States v. Ramsey, 726 P.2d 601 (10th Cir. 1984), the district court held a hearing to determine whether the affidavit constituted newly discovered evidence requiring a new trial.* At that hearing Mr. Jackson

---

* The newly discovered evidence must be more than impeaching or cumulative; it must be material to the issues involved; it must be such as would probably produce an acquittal; and a new trial is not warranted by evidence which, with reasonable diligence, could have been discovered and produced at trial.

Ramsey, 726 F.2d at 604 (quoting United States v. Allen, 554 F.2d 398, 403 (10th Cir.) cert. denied, 434 U.S. 836 (1977).

admitted signing the affidavit but testified that the statements in the affidavit

were false and that his statements during the trial had been true. When asked why he had signed the affidavit, Mr. Jackson testified that he was scared of what the defendant would do to him if he failed to do so. The district court determined that the recanted recantation was false. Since the issue of Mr. Jackson's vacillation had been before the jury in the trial, his recanted recantation was not new evidence and in any event did not justify a new trial.

This case is riddled with recantations and reassertions. On the cold record it is entirely impossible for this court to determine which story is the true version. The district court judge, who took the evidence and personally observed the witness as he testified, was in a much better position than this court to determine whether, even after noting Mr. Jackson's

frequent about-faces, his testimony was nonetheless sufficiently credible to support a jury verdict. The district court's determination that there was no valid recantation but merely another flip-flop by the witness adequately justifies a finding that there was no newly discovered evidence justifying a new trial. While such a precarious and vacillating witness is an unstable stand on which to base a conviction, we cannot say that the record justified overturning the trial court's decision on petition for a new trial.

The other issues presented in appellant's brief have previously been disposed of by this court in United States v. Ramsey, 726 F.2d 601 (10th Cir. 1984), and will not be reexamined here. The judgment of the district court is in all points affirmed.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCH TERM - May 7, 1985

Before the Honorable William J. Holloway, Jr., Honorable Monroe G. McKay, Circuit Judges, and Honorable John L. Kane, Jr.*

UNITED STATES OF AMERICA, Plaintiff-Appellee v. CECIL LEON RAMSEY, Defendant-Appellant	JUDGMENT No. 84-1544 (D.C.# 81-72-CR) A true copy

This cause came on to be heard on the record on appeal from the United States District Court for the Eastern District of Oklahoma and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. It is the further order of this court that appellant shall, within thirty (30) days from and after the date of the filing of the mandate of this court in the district court, surrender

himself to the custody of the United States Marshal for the Eastern District of Oklahoma in execution of the judgment and sentence imposed upon him.

The District Court may, in its discretion, permit the appellant to surrender directly to the designated Bureau of Prisons Institution for service of sentence.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

*United States District Judge of the District of Colorado, sitting by designation.

APPENDIX D

JULY TERM - September 16, 1985

Before Honorable William J. Holloway,Jr., Honorable Monroe G. McKay, Circuit Judges, and Honorable John L. Kane, Jr.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 84-1544

CECIL LEON RAMSEY,
Defendant-Appellant.

This cause comes on for consideration of appellant's, Cecil Leon Ramsey, motion for stay of issuance of mandate and continuance of bail, pending petition for writ of certiorari, appellee's response thereto, and appellant's motion for stay of further proceedings and remand, filed in the captioned matter.

Upon consideration whereof, appellant's motion for stay of issuance of mandate and continuance of bail, pending petition for writ of certiorari, is denied.

It is further ordered that appell-

ant's motion for stay of further proceedings and remand is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

*United States District Judge of the United States District Court for the District of Colorado, sitting by designation.

JULY TERM - September 16, 1985

Before Honorable William J. Holloway, Jr., Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Circuit Judges, and Honorable John L. Kane, Jr., *

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. No. 84-1544
CECIL LEON RAMSEY,
Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing, with suggestion for rehearing in banc, and appellee's response thereto, filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member

of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

*United States District Judge of the United States District Court for the District of Colorado, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellee,)
)
vs.) No. 84-1544
) (No. 82-1120)
CECIL LEON RAMSEY,)
Defendant-Appellant.)

MOTION FOR WITHDRAWAL OF MANDATE

AND GRANTING OF BAIL PENDING CERTIORARI

Comes now the defendant-appellant, Cecil Leon Ramsey, and hereby states to the Court as follows:

1. That this defendant has previously been convicted in the Eastern District of Oklahoma and that the same has been appealed to the United States Court of Appeals, Tenth Circuit, and that on or about the 24th day of Sept., 1985, the mandate was issued by the Tenth Circuit Court of Appeals to the Eastern District of Oklahoma.

2. That at this time, the defendant has a motion for new trial based on

newly discovered evidence pending with the Trial Court in the Eastern District of Oklahoma and that the same has not been ruled on at this time.

3. That the defendant makes this motion to the United States Court of Appeals, Tenth Circuit, based upon the motion for new trial that has been filed and in conjunction therewith, a statement taken on the 9th day of October, 1985, whereby one of the Government's two chief witnesses has recanted his earlier testimony given at trial time. Prior to this time, the other chief witness, Jackson, had previously recanted his testimony and now the remaining witness, Johnson, has now recanted his testimony by means of a certain statement given on the 9th day of October, 1985 whereby he completely absolves the defendant, Cecil Leon Ramsey, of any involvement in said matter.

4. Defendant would further state to the Court that this evidence just presented to the Trial Court, could not have been discovered with due diligence before or during the time of the trial and that it has only recently come to light. Defendant further states to this Honorable Court that this type of evidence is the kind and nature that would most likely result in a different outcome of the trial. This evidence centers around the recantation of the entire testimony given by the Government's two main witnesses. Furthermore, this evidence is not offered for any delaying tactics nor to delay the proper administration of the Court of the United States of America, but is given in an effort to prevent the possible imprisonment of an innocent individual.

5. That this motion for new trial that has been filed in the Eastern District

of Oklahoma, along with the statement made by Randall Morgan Johnson, one of the Government's two main witnesses in the trial, is attached hereto, marked as Exhibit A as though fully setout herein.

6. That the defendant would further state to the Court that a petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit is being filed simultaneously with this application and would respectfully request that a reasonable bail be set and established in this matter pending further hearing.

WHEREFORE, premises considered, defendant prays this Honorable Court withdraw the mandate that has previously been issued to the Eastern District of Oklahoma, to grant bail and to stay all further proceedings until a full and complete evidentiary hearing can be conducted to receive all evidence offered

by the defendant and for any and all other relief that should be just and proper in the premises.

/s/ Ed Edmondson
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ROB L. PYRON
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Seminole, Oklahoma 74868
(405) 382-3750

ATTORNEYS FOR PETITIONER

CERTIFICATE OF MAILING

I certify that on the 23rd day of October, 1985, I mailed a true and correct copy of the foregoing Motion for Withdrawal of Mandate and Granting of Bail Pending Certiorari to United States District Attorney Roger Hilfiger, Federal

Courthouse Building, Muskogee, Ok. 74401, with proper postage thereon fully prepaid.

/s/ Ed Edmondson
ED EDMONDSON

APPENDIX F

MEMORANDUM

TO: THE HONORABLE FRANK SEAY, U.S. DISTRICT JUDGE

FROM: ROB L. PYRON, ATTORNEY, SEMINOLE, OKLAHOMA

SUBJECT: POTENTIAL EVIDENCE OF GOVERNMENT WRONGDOING

DATE: APRIL 4, 1985

I was recently hired to assist Ed Edmondson in preparing some contingent pleadings for Cecil Ramsey so as to be prepared when the 10th Circuit Court of Appeals rules on the pending appeal. In reviewing the transcripts of the case and talking with Mr. Ramsey I became curious about the role played by Floyd (Tuffy) Jackson. My client told me that he was living in Wewoka and working in Seminole at Liberty Motors in the service department.

On the evening of Tuesday, March 26, 1985, I called Jackson at home. After I introduced myself I asked if he would be willing to meet me in my office to discuss

his prior testimony in the Cecil Ramsey case. Jackson volunteered to come to my office in Seminole the very next day during his lunch hour.

On Wednesday, March 27, 1985, Jackson came to my office at noon. We met alone in my office. No electronic recording was made of our conversation.

After discussing some mutual acquaintances, I asked Jackson about his jail time. He told me he did 27 months of a 3½ year sentence and that his accomplice, Chubby Johnson, got a much lighter sentence.

I then asked Jackson if he would discuss in detail with me some points from the Ramsey case. Jackson then emphatically stated he would talk to me and tell me the truth, but that he would not give the truth to anyone else, especially a court reporter or police officer, unless he had "a piece of paper that says I don't go to jail for telling the truth."

I told Jackson that I could not offer or promise him immunity from prosecution that only the proper legal authority could do it.

Jackson then proceeded to answer my questions. Jackson is not a very verbal person so most of my questions were "leading" because he speaks in monosyllables most of the time.

I first asked Jackson if Patrice Latimer, the assistant U.S. Attorney who prosecuted Cecil Ramsey, had ever made an threats to him about the affidavit that he had given Jim Edmondson while in El Reno correctional facility. He said Patrice Latimer had told him prior to going before the grand jury that if he stuck by his affidavit, where he recanted his trial testimony, that he would get five more years for perjury. Jackson said he was frightened that if he didn't repudiate the affidavit that he would

spend five more years in jail.

I then asked Jackson what was the truth - did Cecil Ramsey have anything to do with the fire? Jackson said "no, Ramsey didn't have nothin' to do with it." I then asked why Ramsey was implicated and he then told me that the first time he met with Patrice Latimer after being arrested that Patrice Latimer told he and Chubby Jackson that there was a "real bad guy, a white guy named Cecil Ramsey," that they were going to get. I asked Jackson if Cecil Ramsey's name would have entered into the case had it not been for Patrice Latimer's statements. He told me that Patrice Latimer told he and Chubby Johnson that if they would testify that Cecil Ramsey was in on the crime that they would get light sentences, that she guaranteed it.

Jackson said he went along with it to get a lighter sentence, but when

Chubby got a lesser sentence than he did Jackson felt betrayed by Latimer.

Jackson said during Ramsey's trial that Chubby Johnson bragged about going out with his girl friend and Patrice Latimer for dinner and drinks. Johnson said his brother come along and spent the night with Patrice Latimer.

I asked Jackson if he ever told Patrice Latimer directly that Cecil Ramsey didn't commit the crime he was accused of. Jackson said he did tell her that, but that she became very upset and told him to shut up, that he didn't know how to tell the truth, and then turned her attention solely to Johnson.

I asked Jackson why he was telling me this and he said he had served his time and didn't want to see someone else do time for something they didn't do.

On Wednesday, April 3, 1985 I talked to Jackson on the telephone. I

told him I was just double-checking and was it the truth that he lied in Court and before the grand jury about Cecil Ramsey. He said yes. I asked him if he would ever have even mentioned Cecil Ramsey's name if Patrice Latimer had not brought it up and promised him a light sentence if he would help "get" Ramsey. Jackson said no, Ramsey's name was brought up by Ms. Latimer, but he had nothing to do with the fire.

He then confirmed that he would not give any statements to anyone unless he had immunity from prosecution.

Signed this 4th day of April, 1985.

/s/ Rob L. Pyron

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APPENDIX G

Trial transcript at page 15 lists Darlene Factor as 12th juror called.

Trial transcript at page 20 contains the following voir dire question by the trial judge:

"Are you or anyone in your immediate family connected with law enforcement?"

One juror, named Flippen, answered, "yes" and advised her uncle was a highway patrolman.

Juror Factor made no response to the court's question.

Supreme Court, U.S.
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No. 85-691

In the Supreme Court of the United States

OCTOBER TERM, 1985

CECIL LEON RAMSEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, who was convicted of destroying a building, contends: (1) that he should have been granted a new trial because a witness who testified that petitioner hired him to burn down the building subsequently recanted; (2) that he was denied a fair trial because a juror failed to disclose that she was related to a policeman; and (3) that he was improperly convicted under 18 U.S.C. 844 because, prior to its amendment in 1982, that statute did not prohibit the burning of a building.

1. Following a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted of malicious destruction of a building by means of an explosive and conspiring to do so, in violation of 18

U.S.C. 371, 844(i), and 2. He was sentenced to two consecutive five-year terms of imprisonment. The court of appeals affirmed (Pet. App. C1-C9).[1]

a. The evidence at trial showed that in the summer of 1981 petitioner hired Floyd Jackson to break into and destroy a grocery store in Wagoner County, Oklahoma. Jackson, testifying for the prosecution, stated that petitioner instructed him to break into the store around midnight and suggested that he use gasoline to destroy the building. The next night, Jackson and two confederates—Tommy Rockwell and Randall Johnson—broke into the store and poured gasoline throughout it.[2] The gasoline ignited before they intended, killing Rockwell, injuring Jackson and Johnson, and destroying the store. 726 F.2d 601, 603 (1984). Jackson also testified that, before the trial, he told petitioner's son that petitioner had nothing to do with the fire. Defense counsel cross-examined Jackson on this issue. Pet. App. B4.

b. After the trial, Jackson executed an affidavit recanting his trial testimony. Jackson stated that he burned down the store on his own because petitioner owed him money and he mistakenly believed that petitioner owned the store, although in fact petitioner's girlfriend owned the store. The district court denied petitioner's motion for a new trial based on Jackson's recantation without a hearing. 726 F.2d at 604.

The Tenth Circuit then issued its first opinion in this case. It first rejected petitioner's argument that gasoline is not an explosive within the meaning of 18 U.S.C. 844 on the basis of *United States* v. *Bunney*, 705 F.2d 378 (10th Cir. 1983). 726 F.2d at 603. It also rejected petitioner's

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[1] The court of appeals issued two opinions in this case, but petitioner included only the second opinion in his petition. The court of appeals' first decision is reported at 726 F.2d 601 (1984).

[2] Johnson corroborated Jackson's testimony that petitioner paid Jackson to burn down the store (Pet. App. B4).

claim that the district court erred by refusing to interview a juror, Darlene Factor, after the trial. Petitioner claimed that Factor should have responded that she was the sister-in-law of a policeman when asked during voir dire whether anyone in her immediate family was connected with law enforcement. The court of appeals noted that the district court had offered to question Factor before the jury began deliberations, when she could have been replaced by another juror, but defense counsel refused that offer. The court held that petitioner had waived his right to complain about Factor by refusing that offer. *Id.* at 603-604. But the court of appeals remanded the case to the district court for a hearing on whether Jackson's recantation constituted newly discovered evidence that warranted a new trial. *Id.* at 604-605.

c. At the hearing on remand, Jackson testified that his affidavit recanting his trial testimony was "not true" and that "his trial testimony was true and correct" (Pet. App. B3). He explained that he had executed the affidavit because "he was scared of what [petitioner] might do" (*ibid.*). Jackson again testified that, prior to trial, he had falsely told petitioner's son that petitioner had nothing to do with the fire, and Jackson's confederate Johnson "again corroborated Jackson's trial testimony of [petitioner's] paying Jackson to burn the store" (Pet. App. B4). The district court then denied petitioner's motion for a new trial. It found that Jackson's pretrial statements exonerating petitioner were known to the defense at trial, were in fact used to cross-examine Jackson, and therefore his recantation did not constitute newly discovered evidence. The court found further that Jackson's affidavit was "false with respect to the differences between it and Jackson's trial testimony" and that "the jury previously has heard these allegations and determined Jackson's credibility thereon" (*id.* at B5).

The court of appeals affirmed (Pet. App. C1-C9). It acknowledged that "[o]n the cold record" it is impossible to determine which of Jackson stories is true (Pet. App. C6). However, the district court, which "took the evidence and personally observed the witness as he testified," was in a much better position to judge Jackson's testimony (*ibid.*). Accordingly, the court held that "[t]he district court's determination that there was no valid recantation but merely another flip-flop by the witness adequately justifies a finding that there was no newly discovered evidence justifying a new trial" (*id.* at C7).

2. a. Petitioner contends (Pet. 20-23) that he is entitled to a new trial on the basis of Jackson's recantation. This factbound claim was correctly decided below. At the hearing on this issue, Jackson repudiated his recantation and reaffirmed the accuracy of his trial testimony, and his accomplice Johnson again corroborated Jackson's trial testimony. Furthermore, as the courts below noted, Jackson's pretrial statements exonerating petitioner were used to impeach him at trial. In these circumstances, the findings of the district court and the court of appeals that the recantation does not require a new trial do not warrant review by this Court.[3]

b. Petitioner's claim (Pet. 23-25) that the trial court erred by failing to inquire whether juror Darlene Factor had failed to disclose on voir dire that she was related to a law enforcement officer lacks merit. As the court of appeals correctly observed, petitioner waived this issue by refusing the district court's offer to interview Factor prior to jury deliberations. By so doing, petitioner relinquished

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[3] Petitioner's observation (Pet. 13) that he has filed another motion for a new trial based upon new recantations by Jackson and Johnson obviously does not provide any basis for this Court to review the district court's denial of the motion for a new trial that the court of appeals affirmed in the judgments presented for review by the petition for a writ of certiorari.

an opportunity to establish a factual predicate for this claim and prevented the district court from removing Factor from the jury at a time when any problem that existed could have been seasonably cured. In these circumstances, review by this Court is unwarranted.

c. Finally, the court of appeals correctly rejected petitioner's argument (Pet. 14-20) that gasoline is not an explosive within the meaning of 18 U.S.C. (1976 ed.) 844(j).[4] This issue is of little continuing importance, because Congress has amended Section 844 in the Anti-Arson Act of 1982 to make clear that anyone who destroys a building "by means of fire" or by means of an explosive device is subject to federal prosecution (Pub. L. No. 97-298, § 2(a), 96 Stat. 1319). That legislation applies to all conduct occurring after October 12, 1982. Petitioner nevertheless contends that this Court should resolve the difference of opinion among the circuits concerning the construction of the term explosives as used in Section 844 prior to its amendment in 1982. This Court recently has denied petitions raising substantially the same claim in *Lee* v. *United States*, No. 83-6457 (June 18, 1984); *Avery* v. *United States*, No. 83-1419 (Mar. 26, 1984); *Morrow* v. *United States*, 464 U.S. 1069 (1984); and *Xheka* v. *United States*, 464 U.S. 993 (1983). There is no reason for a different result here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

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[4] Expert testimony presented at trial established that, because of the way in which the gasoline was used to destroy the store, it acted as an explosive device (Tr. 157, 679-687). Other evidence established that there was in fact an explosion (Tr. 68, 72, 129).

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